Supreme Court, U.S.
FILED
FEB 10 1992
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BRANDON STEEL DECKS, INC.,

Petitioner,

v.

WANDA P. HINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TIMOTHY A. BUMANN
Counsel of Record

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I

QUESTION PRESENTED

Whether this Court should grant certiorari to correct the Eleventh Circuit Court of Appeals' continuing refusal to allow the admission of government reports after this Court's ruling in *Beech Aircraft v. Rainey*?

II

CERTIFICATE OF INTERESTED PARTIES

In addition to Wanda P. Hines and Brandon Steel Decks, Inc., parties to the case, Scottsdale Insurance Company is interested in the case as the insurer for Brandon Steel Decks, Inc.

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III

OPINION BELOW

In its decision of November 12, 1991, the Eleventh Circuit Court of Appeals affirmed the district court's exclusion of an OSHA report in *Wanda P. Hines v. Brandon Steel Decks, Inc.* No. 91-8151 without opinion.

IV

JURISDICTION

The district court order excluding the OSHA report was affirmed by the Eleventh Circuit Court of Appeals on November 12, 1991. No motion for rehearing or rehearing *en banc* was filed. Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254 (1).

V

STATUTORY PROVISIONS INVOLVED

FEDERAL RULE OF EVIDENCE 803(8)(C)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth

. . .

(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FEDERAL RULE OF EVIDENCE 401

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

or less probable than it would be without the evidence.

FEDERAL RULE OF EVIDENCE 403

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

VI

STATEMENT OF THE CASE

Wanda P. Hines commenced this wrongful death action on July 15, 1987, by filing a complaint against Brandon Steel Decks, Inc. ("Brandon Steel") in the United States District Court for the Middle District of Georgia, Albany-Americus Division.

At trial, Brandon Steel tendered a report prepared by an inspector from the Occupational Safety and Health Administration into evidence. The report stated, among other things, that Brandon Steel did not employ any of the individuals allegedly negligent in this case, and exercised no control over the operations which resulted in the death of plaintiff's decedent. Hines' counsel objected on the grounds that the conclusions and opinions in the report were not admissible under Federal Rule of Evidence 803(8)(C). The trial court ruled that, under *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987) (*en banc*), only the factual findings contained in the OSHA report were admissible.

On appeal, the Eleventh Circuit reversed and remanded the case (in part) with direction to review the

OSHA report in light of this Court's opinion in *Beech Aircraft v. Rainey*, 109 S. Ct. 439, 488 U.S. 153, 102 L. Ed. 2d 445 (1988). This Court's opinion in *Rainey* reversed the Eleventh Circuit on the point of law that the district court relied on in its ruling at trial.

In its opinion reversing and remanding the case to the trial court, however, the Eleventh Circuit expanded this Court's *Rainey* test adding new elements to it. Based on the additional elements added by the Eleventh Circuit, the district court again excluded the OSHA report.

On November 12, 1991 the Eleventh Circuit again affirmed the district court's exclusion, this time without opinion.

The original tort action was heard by the United States District Court based upon 28 U.S.C. § 1332. Jurisdiction in the Eleventh Circuit Court of Appeals was based upon 28 U.S.C. § 1291.

VII

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS BECAUSE THE ELEVENTH CIRCUIT IS IGNORING THIS COURT'S DECISION IN *BEECH AIRCRAFT CORP. V. RAINEY* AND IS CONTINUING TO EXCLUDE ACCIDENT REPORTS WHICH HAVE BEEN PREPARED BY GOVERNMENT INVESTIGATORS.

In December 1988 this Court reversed the Eleventh Circuit Court of Appeal's decision in *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11 Cir. 1989). This Court held that "factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)(c)." *Beech Aircraft Corp. v. Rainey*, 109 S. Ct. 439, 448 U.S. 153, 102 L. Ed. 2d 445 (1988).

In *Rainey*, the Eleventh Circuit Court of Appeals had excluded the report of a Navy investigator. The Navy investigator had conducted a factual investigation of an air crash involving a student pilot and his instructor. The dispute in both *Rainey* and this case concern those portions of the investigative reports which contain the conclusions

based upon the factual investigations. In *Rainey* this Court held that "as long as the conclusion [sought to be admitted] is based on a factual investigation and satisfies [Rule 803(8)(C)'s] trustworthiness requirement, it should be admissible along with other portions of the report." *Id.* at 450.

The Eleventh Circuit Court of Appeals noted in its original opinion in this case that "the district court did not exercise discretion in excluding certain portions of the OSHA report." *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 252, 255 (11th Cir. 1989). Instead, the district court relied on the Eleventh Circuit's *Rainey* decision which was subsequently reversed by this Court. *Id.*

In remanding the case, however, the Eleventh Circuit chose to ignore this Court's *Rainey* decision as it applies to factual conclusions contained in reports offered for admission under Federal Rule of Evidence 803(8)(C). In its five page opinion, the Eleventh Circuit Court of Appeals spent two brief paragraphs discussing *Rainey* as it applies to the OSHA report in this case. The rest of the court's discussion of the case centered around additional factors and tests which the Eleventh Circuit grafted onto this Court's

opinion in *Rainey*. The Eleventh Circuit spent the bulk of its discussion charting a course for the district court to follow to exclude the evidence as being untrustworthy, cumulative, irrelevant or prejudicial. *Hines*, 886 F.2d at 256-8.

Not surprisingly, the district court took its cue from the Eleventh Circuit and held that the OSHA report was untrustworthy, irrelevant and prejudicial.

When Brandon Steel Decks again appealed the district court's exclusion of the OSHA report, the Eleventh Circuit took no notice when your petitioner pointed out that:

(1) trustworthiness had never been an issue in the case until it was raised by the trial court on remand;

(2) the Rule 403 analysis was first raised by the Eleventh Circuit on appeal;

(3) the OSHA report could not be more relevant within the meaning of Rule 401, since the jury was being asked to find the same facts which had been found by the OSHA investigation; and

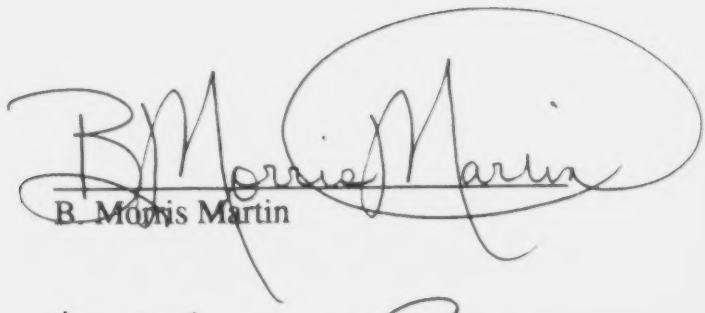
(4) Hines never made a Rule 403 objection to the OSHA report, so there was no evidence of "prejudice" in the record upon which to base a Rule 403 exclusion.

The lack of any objection by Hines aside, Brandon Steel Decks will concede that the findings in the report are prejudicial. In fact, all evidence offered against the party is "prejudicial" to some extent, or it would not be relevant to the case in which it is offered. The prejudice incumbent in the OSHA report is far outweighed by the relevance of OSHA's factually based conclusions.

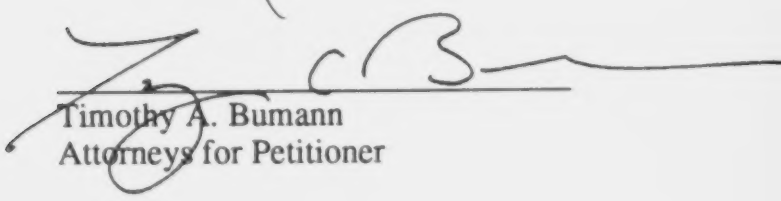
CONCLUSION

The Eleventh Circuit Court of Appeals has ignored this Court's decision in *Beech Aircraft*. While citing to *Beech Aircraft* in its opinion, the Eleventh Circuit has actually created an entirely new test to be applied to reports such as that which were offered in *Rainey* and *Brandon Steel Decks*. For that reason, this Court should issue a writ of certiorari to the Eleventh Circuit Court of Appeals so that this court's ruling in *Beech Aircraft* can be implemented in that circuit.

This 10th day of February, 1992.



B. Morris Martin



Timothy A. Bumann
Attorneys for Petitioner

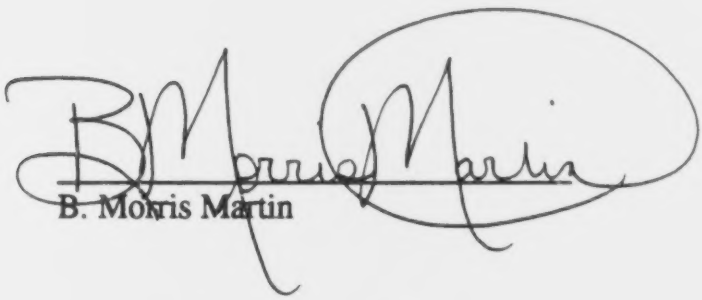
CERTIFICATE OF SERVICE

I hereby certify that I have duly served a copy of the foregoing Petition for a Writ of Certiorari on:

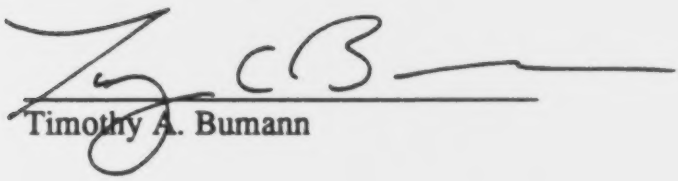
Samuel W. Oates, Jr.
Oates, Byars & Hollington
P. O. Box 20
1043 First Avenue
Columbus, Georgia 31902

by depositing a copy in the United States Mail with adequate postage affixed thereto to insure the delivery of the same.

This 10th day of February, 1992.



B. Morris Martin



Timothy A. Bumann

APPENDIX A

THE FOLLOWING IS A COMPLETE REPRODUCTION OF THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 91-8151

D.C. Docket No. 87-134-ALB-A-AMER

WANDA P. HINES,

Plaintiff-Appellee,

versus

BRANDON STEEL DECKS, INC.,

Defendant-Appellant.

Appeal from the United States District Court

for the Middle District of Georgia

(November 12, 1991)

Before JOHNSON*, CLARK* and PECK**, Senior Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

The motion of the appellee, Wanda P. Hines, for Rule 38 sanctions against Brandon Steel Decks, Inc. is DENIED. "Costs taxed against defendant-appellant."

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Judgment Entered: November 12, 1991

For the Court: Miguel J. Cortez, Clerk

By: s/s

Deputy Clerk

ISSUED AS MANDATE: DEC 18 1991

APPENDIX B

THE FOLLOWING IS A COMPLETE REPRODUCTION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ALBANY/ AMERICUS DIVISION'S DECISION

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY/AMERICUS DIVISION

WANDA P. HINES,	:	
Plaintiff,	:	
vs.	:	CIV. NO. 87-123-ALB/
BRANDON STEEL	:	AMER(DF)
DECKS, INC.,	:	
Defendant.	:	

Plaintiff Wanda P. Hines, whose husband died on January 12, 1987, when he fell from a structure that collapsed under the weight of misplaced steel decking, filed a wrongful death action against the defendant Brandon Steel Decks, Inc., alleging that it negligently caused the death of her husband. The case came to trial before the court sitting with a jury on the 11th, 12th and 13th day of July, 1988.

At the trial, the defendant tendered into evidence a report prepared by an Occupational Safety and Health Administration (OSHA) investigator concerning the January 12, 1987, incident which resulted in the death of the plaintiff's husband. The court ruled, however, that pursuant to the Eleventh Circuit Court of Appeals' holding in *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987), *aff'd in part and rev'd in part*, 488 U.S. 153, 109 S.Ct. 439 (1988), opinions and conclusions contained in the OSHA report submitted by the defendant were not admissible in the case.[1] The defendant appealed that decision which the Eleventh Circuit Court of Appeals reviewed and remanded based on the fact that the legal standard it set out in *Rainey*, which this court relied upon, had subsequently been overturned by the Supreme Court of the United States. *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989).

---

[1] The court excluded the following "opinions" and "conclusions" recounted in the OSHA report:

1. Mr. Richard Burrows was a Conn-Delmar employee "loaned" from Brandon Steel;
2. Conn-Delmar was the employer of both (deceased) men at the time of the accident;
3. Conn-Delmar's foreman controlled the work;
4. It was Conn-Delmar's idea that the decking be placed on the joists that morning;
5. No evidence exists that Brandon Steel had control over the work being done at the time of the accident;
6. At no time did any Brandon Steel employees have control over the operation.

The court, therefore, must now reconsider the admissibility of previously excluded portions of the OSHA report submitted by the defendant in light of the Supreme Court's recent reversal of *Rainey*.

The court's determination of admissibility is guided by the United States Supreme Court's finding in *Rainey* that "[a] trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof-whether narrow 'factual' statements or broader 'conclusions'-that []he determines to be untrustworthy. Moreover, safeguards built in to [sic] other portions of Federal Rules, such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 448-49 (1988). An inquiry into the trustworthiness, relevance, and possible prejudice of the OSHA report involved in this case leads the court to conclude that the previously excluded portions of the OSHA report should not be admitted into evidence.

The trustworthiness of the excluded portions of the OSHA report are suspect for a number of reasons. First, the

court is not convinced that the OSHA investigator who compiled the report has the necessary expertise in deciding legal issues of agency; which is what he attempts to do in the excluded portions of his report. Second, the investigator, who had no first hand knowledge of the events in question, gathered information without holding any type of hearing or affording interested parties an opportunity to cross-examine witness. A final factor affecting the trustworthiness of the report is that the plaintiff was not, and is not, assured of an opportunity to cross examine the investigator who drafted the OSHA report since federal law generally prohibits OSHA investigators from testifying in private civil litigation. *See* 29 C.F.R.§ 2.20 *et seq.*; *Hines*, 886 F.2d at 303.

Questions of relevancy and prejudice also argue against admitting the previously excluded portions of the OSHA report. The excluded portions of the report are limited in their relevance because both parties had the opportunity to, and did, present evidence on the question of agency other than that contained in the OSHA report. Furthermore, the jury had access to the same information used by the OSHA investigator to reach his excluded

opinions and conclusions since the witnesses who gave testimony to the investigator also testified at the trial.

Admission of the excluded portions of the OSHA report could also have an unwarranted prejudicial effect on plaintiff's case; prejudice that could result from the jury placing too much weight on the OSHA investigator's questionable determinations regarding ultimate issues which the jury itself is responsible for deciding. That danger of unfair prejudice substantially outweighs the probative value of the findings contained in the OSHA report.

Lack of trustworthiness combined with limited relevance and the likelihood of substantial prejudicial effect convince the court that the previously excluded portions of the OSHA report should remain inadmissible. Accordingly, defendant's request that the portions of the OSHA report excluded during the trial of this case be admitted into evidence is hereby DENIED. The judgment of the court rendered in this case therefore stands as issued on July 21, 1988.

SO ORDERED, this ___ day of January, 1990.

s/s

DUROSS FITZPATRICK, JUDGE

UNITED STATES DISTRICT

COURT

RPB/BBB

APPENDIX C

THE FOLLOWING IS A COMPLETE REPRODUCTION OF THE CIRCUIT COURT'S DECISION

Hines v. Brandon Steel Decks, Inc., 886 F.2d 252 (11th Cir. 1989)

Appeal from the United States District Court for the Middle District of Georgia.

Before CLARK and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

CLARK, Circuit Judge:

This is a wrongful death action brought in federal court on the basis of diversity jurisdiction. On appeal, we address the propriety of the district court's refusal, during trial, to admit into evidence the opinions and conclusions contained in an OSHA investigative report. In light of the Supreme Court's intervening decision of *Beech Aircraft v. Rainey*, _____ U.S. _____, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), we remand this case to the district court for reconsideration.

BACKGROUND

Prior to January 1987, Brandon Steel Decks, Inc. (Brandon Steel), was a roof decking contractor, headquartered in Brandon, Florida. As a decking contractor, Brandon Steel installed metal roof decking on buildings. On January 8, 1987, Emory Singletary, son of the owner of the company, arrived in Cordele, Georgia, along with Richard Burrows and Bill Wood, regular employees of Brandon Steel, to begin work on a decking contract at the Southeastern Frozen Foods plant then under construction in Cordele. Conn-Delmar Steel Erectors, Inc., (Conn-Delmar), contracted to do the structural steel work on the building and was already present on the job site when Mr. Singletary and his employees arrived.

Upon arriving in Cordele, Mr. Singletary found that Conn-Delmar was running behind schedule and had completed relatively little of the structural steel work. Consequently, there was very little decking work for Brandon Steel to do. Nonetheless, the Brandon Steel employees proceeded to complete the decking work on a relatively low portion of the building. Having completed all of the decking work that could be done given the lack of

a completed structural frame, Singletary returned to Florida to await completion of the structural steel. Upon learning of Singletary's plans to Florida, Bill Meredith, president of Conn-Delmar, agreed with Singletary that Bill Wood and Richard Burrows would stay on the site for a few days as employees of Conn-Delmar to assist with the completion of the structural frame of the building. Wood and Burrows then worked for Conn-Delmar on January 10 and 11, 1987, and were paid in cash by Bill Meredith for the work done on those days.

Conn-Delmar completed a substantial portion of the structural frame of the building by January 11, 1987, and on the morning of January 12, 1987, several men attempted to land bundles of steel roof decking on the top of the frame of the structural steel. The men involved in the landing of the decking on that morning were Bill Wood, Richard Burrows, Quinten Holcomb (Conn-Delmar's foreman), Robert Griffin and Pete Hines (Conn-Delmar employees). Although Conn-Delmar's equipment was used, the work being done was under Brandon Steel's contract. Thus, a dispute exists over which company was in charge of this work and which company employed

Richard Burrows and Bill Wood on that particular morning. Other disputes involve which individuals were directing the crane and who made the decision to land the decking in a certain area.

In any event, the first bundle of decking that was landed on the superstructure that morning was placed directly in the center of a span of bar joists. This placement of the decking was admittedly dangerous; the proper place to land decking is at the intersection of a bar joist and a girder. When the crane operator landed the second bundle on top of the first bundle, the superstructure collapsed and both Mr. Hines and Mr. Burrows fell to their deaths. The next day, an investigator from the Occupational Safety and Health Administration, (OSHA), arrived on the scene of the accident, interviewed several people and prepared an official report.

On July 15, 1987, Wanda P. Hines commenced this action by filing a complaint against Brandon Steel in the United States District court for the Middle District of Georgia. Brandon Steel timely answered, and the case proceeded to trial on July 11, 1988. During trial, Brandon Steel tendered into evidence the report prepared by the

OSHA inspector. The report stated, among other things, that Brandon Steel did not employ any of the individuals allegedly negligent in this case, and exercised no control over the operations which resulted in the death of plaintiff's decedent. Plaintiff's counsel objected on the grounds that the conclusions and opinions in the report were not admissible under Federal Rule of Evidence 803(8)(C).[2]

The district court applied *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987) (*in banc*) to resolve the issue. Under the Eleventh Circuit *Rainey* decision, opinions and conclusions contained in public reports were not admissible under Rule 803(8)(C). Thus, the district court held that only so much of the OSHA report as dealt with specific findings of fact would be admitted and that all conclusions and opinions would be excluded. Accordingly, the parties struck out the following "opinions" and "conclusions" recounted in the OSHA report:

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2 Rule 803(8)(C) provides:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness;

. . .

lting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

1. Mr. Richard Burrows was a Conn-Delmar employee "loaned" from Brandon Steel;
2. Conn-Delmar was the employer of both (deceased) men at the time of the accident;
3. Conn-Delmar's foreman controlled the work;
4. It was Conn-Delmar's idea that the decking be placed on the joists that morning;
5. No evidence exists that Brandon Steel had control over the work being done at the time of the accident;
6. At no time did any Brandon Steel employees have control over the operation.

The rest of the report was admitted into evidence and published to the jury without emphasis or comment from either party. After closing arguments and instructions, the jury returned a verdict in favor of the plaintiff in the amount of $620,000.00. The district court entered judgment in accordance with the jury's verdict on July 21, 1987. Brandon Steel timely filed this appeal. While the appeal was pending, the Supreme Court unanimously reversed the Eleventh Circuit *Rainey*

decision. *Beech Aircraft Corp. v. Rainey*, 109 S.Ct. 438. Specifically, the Supreme Court held that "factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)(C)." *Id.* at 446.

DISCUSSION

[1] Rule 803(8)(C) allows into evidence public reports that (1) set forth factual findings (2) made pursuant to authority granted by law (3) that the judge finds trustworthy. Fed.R.Evid. 803(8)(C). In addition, public reports, otherwise admissible under Rule 803(8)(C), may nonetheless be excluded in whole or in part if the trial court finds that they are either irrelevant or more prejudicial than probative. *See Rainey*, 109 S.Ct. at 448-49; *United States v. MacDonald*, 688 F.2d 224, 230 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983). The district court has broad discretion to admit or exclude evidence during trial and the decision to exclude certain evidence will not be reversed absent a clear showing of abuse of that discretion. *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 (11th Cir. 1986) (*in banc*).

[2] In this case, however, the district court did not exercise discretion in excluding certain portions of the OSHA report. Rather, the court understandably relied on the Eleventh Circuit *in banc Rainey* opinion and held that the opinions and conclusions contained in the report were *per se* inadmissible under Rule 803(8)(C). This rationale had since been explicitly rejected by the Supreme Court. Under these circumstances, we have no choice but to remand the case to the district court for reconsideration of the report's admissibility in light of the Supreme Court's recent reversal of *Rainey*.

In order to aid the district court on remand in determining the admissibility, either in whole or in part, of the OSHA report, we discuss some factors that the district court may wish to consider.

A. LEGAL VERSUS FACTUAL CONCLUSIONS

[3] In footnote thirteen of the Supreme Court *Rainey* opinion, the Court cautioned that it expressed no view as to whether a legal conclusion as opposed to a factual conclusion was admissible under Rule 803(8)(C):

> We emphasized that the issue in this case is whether Rule 803(8)(C) recognizes any difference between

> statements of "fact" and "opinion." There is no question in this case of any distinction between "fact" and "law." We thus express no opinion on whether legal conclusions contained in an official report are admissible as "findings of fact" under Rule 803(8)(C).

Rainey, 109 S.Ct. at 450 n. 13. In his concurring opinion in the Eleventh Circuit *Rainey* case, Judge Tjoflat suggested that, indeed, legal conclusions contained in reports would not fall within Rule 803(8)(C) as a "finding." "The common meaning of finding . . . comports with investigative conclusions (i.e., the results derived from the examination of facts), but not with idle speculation or legal conclusions: 'a finding does not include legal conclusions that may have been reached by an investigator and is necessarily something more than a mere recitation of evidence. . . .'" *Rainey*, 827 F.2d at 1510 (citation omitted). We agree that Rule 803(8)(C) does not provide for the admissibility of the legal conclusions contained within an otherwise admissible public report. Thus, one approach that the district court might take is to determine whether any of the excluded portions of the OSHA report

contain legal conclusions that fall outside the purview of Rule 803(8)(C). Legal conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires.

We caution, however, that the amorphous line between "factual" and "legal" conclusions may obscure a practical analysis under this rubric. While a legal conclusion encompasses "the idea that the State will habitually sanction and enforce a legal relation of a specific content," a factual conclusion is one of a number of "contingencies on which the State predicates this relation." Isaacs, *Law and the Facts*, 22 Colum.L.Rev. 1 (1922). Another way of looking at this inquiry is: Would the conclusion, if made by the district court, be subject to the clearly erroneous standard of review on appeal? If so, then the conclusion is factual; if not, then the conclusion is legal. In addition, for those conclusions which are a mixed question of law and fact, a potential framework for analysis

would be to ask whether the investigator made a finding of the "ultimate facts" underlying the legal conclusion.

B. TRUSTWORTHINESS

We further note that most cases analyzing the admissibility of reports under 803(8)(C) do not frame the issue in terms of factual versus legal conclusions. Instead, almost all of the courts frame the inquiry in terms of trustworthiness. Comment, *The Trustworthiness of Government Evaluation Reports under Federal Rule of Evidence 803(8)(C)*, 96 Harv.L.Rev. 492, 497-98 (1982). The Advisory Comments to the rule set forth several considerations to aid in determining the trustworthiness of a public report: the timeliness of the investigation; the skill and experience of the investigator; whether the investigator held any sort of a hearing; and the investigator's impartiality. These considerations are not meant to be exhaustive. Advisory Committee's Notes on Fed.R.Evid. 803(8), 28 U.S.C.App., p. 725.

[4, 5] Under these factors, the district court might consider whether the OSHA investigator's "expertise" includes that necessary to decide questions of agency and whether this factor goes to the admissibility of the report or

merely to its weight. *Cf. Fraley v. Rockwell International Corp.*, 470 F.Supp. 1264, 1267 (S.D. Ohio 1979) (document properly excluded where prepared by inexperienced investigator in highly complex field of investigation); *United States v. School District of Ferndale*, 577 F.2d 1339, 1354-55 (6th Cir.1978) (fact that HEW examiner not an expert goes to weight and not to admissibility; therefore examiner's findings were erroneously excluded as untrustworthy). Furthermore, the district court might consider how the fact that no hearing was held in making the report affects its trustworthiness. *See Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821-22 (10th Cir.1981) (Civil Rights Commission's findings on discrimination properly excluded where ex parte investigation lacked formal procedures such as opportunity to cross-examine witnesses; *McKinnon v. Skil Corp.*, 638 F.2d 270, 278 (1st Cir.1981) (Consumer Product Safety Commission Reports properly excluded as untrustworthy where they contained double hearsay on issues of defect, causation and negligent design); *Miller v. Caterpillar Tractor Company*, 697 F.2d 141, 144 (6th Cir.1983)

(report excluded because relied upon hearsay statements of witnesses interviewed by investigator).

[6] In addition, the OSHA investigator stands in a unique position because federal law generally prohibits him or her from testifying in private civil litigation. *See* 29 C.F.R. { 2.20 *et seq.* While the inability to cross-examine the investigator cannot *per se* invalidate the report since Rule 803(8) does not depend on the availability of the declarant, it is nonetheless a proper factor to take into consideration when deciding trustworthiness. *See Wilson v. Attaway*, 757 F.2d 1227, 1245 (11th Cir.1985) (report excluded for a variety of reasons including failure to afford possibility of cross-examination); *see generally The Trustworthiness of Government Evaluation Reports*, 96 Harv.L.Rev. at 499.

C. CUMULATIVE, IRRELEVANT OR PREJUDICIAL

[7] Finally, the district court might consider whether the report should be excluded under any of the other Rules of Evidence. For instance, if sufficient evidence existed on the question of agency, then the report may be cumulative and excludable under Fed.R.Evid. 403.

See Johnson v. Yellow Freight System, Inc., 734 F.2d 1304, 1309-10 (8th Cir.), *cert. denied*, 469 U.S. 1041, 105 S.Ct. 525, 83 L.Ed.2d 413 (1984). The report might also be excluded as irrelevant or as more prejudicial than probative. Fed.R.Evid. 402 & 403; *see MacDonald*, 688 F.2d at 230 (although otherwise admissible under Rule 803(8)(C), report properly excluded where it would not help jury with ultimate issue of case and would be confusing).

CONCLUSION

The foregoing considerations are merely suggestive; we leave the initial determination of the admissibility of the OSHA report to the sound discretion of the district court. The case is therefore REMANDED to the district court to consider the admissibility of the OSHA report in light of *Beech Aircraft v. Rainey*, __ U.S. ____, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), and such other factors as the court deems appropriate.

REMANDED.